

CENTRAL INTELLIGENCE AGENCY  
WASHINGTON, D.C. 20505

Approved For Release 2005/02/15 : CIA-RDP85-00759R000100160008-1

28 May 1976

MEMORANDUM FOR: John O. Marsh, Jr.  
Counsellor to the President

FROM:

[REDACTED]  
Acting Legislative Counsel

SUBJECT: CIA Views of S. Res. 400

This memorandum is CIA's response to your request at the 25 May ICG meeting that each agency summarize its views on S. Res. 400. CIA views are part I of this memorandum. The passage of S. Res. 400 requires some decisions and action by the Executive branch and by individual agencies. Part II of this memorandum enumerates some areas which need Executive branch attention. The Director has not reviewed this paper, and therefore this should be considered a working draft.

I. OPPORTUNITIES AND PROBLEMS

A. Both Mr. Bush and Mr. Colby have made strong statements supporting the concept of strong and effective congressional oversight. During his 31 March testimony before the Senate Rules Committee on S. Res. 400, Mr. Bush said:

"The Central Intelligence Agency welcomes strong and effective congressional oversight. We have a great deal to gain from it. We gain the advice and counsel of knowledgeable Members. Through it, we can maintain the trust and support of the American people. We will retain this support only so long as the people remain confident that the political structure provides clear accountability of our intelligence services, through effective Executive and congressional oversight."

Intelligence oversight committees have been criticized, even by members of the committees, of not adequately performing their responsibilities. Because of this criticism, these committees were not in a position to defend intelligence agencies, even in the face of patently ridiculous charges.



OGC Has Reviewed

FOR OFFICIAL USE ONLY

Approved For Release 2005/02/15 : CIA-RDP85-00759R000100160008-1

to review  
of CIA  
note

A new committee, composed of members not associated with past oversight, could prove a powerful asset, a powerful defender. Of course the committee will first have to gain a thorough knowledge of intelligence programs.

B. Another positive aspect of S. Res. 400 is its recognition that Congress must find the means to halt the unauthorized disclosure of classified information by Members and staff. Section 8(c)(1) prohibits the disclosure of information relating to lawful U.S. intelligence activities by individual Members and staff. Section 8(d) directs the Select Committee on Standards and Conduct to investigate any unauthorized disclosure by a Member or staff member. If the Select Committee on Standards and Conduct finds the charges to be substantiated, it is to recommend "appropriate action such as censure, removal from committee membership, or expulsion from the Senate, in the case of a Member, or removal from office or employment or punishment for contempt, in the case of an officer or employee."

The legislative history of the Resolution, particularly its consideration by the Government Operations Committee, shows concern about the Senate's responsibility to discipline its own Members, especially because of the Speech and Debate Clause of the Constitution. Senator Huddleston, a member of the new committee, was instrumental in placing disclosure restrictions in the Resolution. Although it remains to be seen whether this spirit will prove stronger than traditional congressional reluctance to chastise or discipline another Member, the Senate is on record as acknowledging its responsibilities in this area.

C. The Resolution does not provide for the exclusivity or concentration of oversight which would assure that exposure to such sensitive matters would be limited to the minimum number of members or committees required to exercise effective oversight. For most agencies, the Resolution simply creates another committee (a very large one) to delve into agency programs and activities, without removing jurisdiction from standing committees. Legislative and authorization jurisdiction for CIA is exclusively the province of the new committee. However, section 3(c) of the Resolution provides:

"(c) Nothing in this resolution shall be construed as prohibiting or otherwise restricting the authority of any other committee to study and review any intelligence activity to the extent that such activity directly affects a matter otherwise within the jurisdiction of such committee."

This provision was meant primarily to assure other committees that they could still exercise a general oversight of the intelligence activities of the agencies they oversee. For example, the Judiciary Committee would be able

FOR OFFICIAL USE ONLY

Sh  
the

FOR OFFICIAL USE ONLY

Approved For Release 2005/02/15 : CIA-RDP85-00759R000100160008-1

to review and study FBI intelligence activities. However, the provision does not exclude CIA, and a floor colloquy between Senators Ribicoff and Pell (Appendix A) gave a very expansive interpretation to this section. We are hopeful that the new committee will quickly develop the respect and muscle to forestall the proliferation of information on sensitive intelligence through the review and study of CIA activities by other committees. (Of course, reporting responsibilities under section 662 of the Foreign Assistance Act remain.)

D. Section 8(a) of the Resolution asserts the right of the Committee to "disclose publicly any information in the possession of such committee after a determination by such committee that the public interest would be served by such disclosure." Section 8(b) establishes procedures the Committee must follow in order to release classified information. These procedures involve notification of the President, and referral of the issue to the full Senate should the President personally object and should the Committee maintain its desire to release the information. Procedurally, this section is as good as the Executive branch could have hoped for.

Clearly this section could pose constitutional questions. The President's position on the release of classified information by Congress was stated in his 18 February message to Congress:

"Any foreign intelligence information transmitted by the Executive Branch to the Oversight Committee, under an injunction of secrecy, should not be unilaterally disclosed without my agreement. Respect for the integrity of the Constitution requires adherence to the principle that no individual member nor committee, nor single House of Congress can overrule an act of the Executive. Unilateral publication of classified information over the objection of the President, by one committee or one House of Congress, not only violates the doctrine of separation of powers, but also effectively overrules the actions of the other Houses of Congress, and perhaps even the majority of both Houses."

Assistant Attorney General Antonin Scalia also addressed this issue in his 12 March 1976 statement before the Senate Judiciary Committee.

"I would not assert that this [classification by the Executive branch] alone should prevent publication by a House of Congress. The need for secrecy is, like most needs, a relative matter, and merely because the Executive Branch has determined for its internal purposes that a particular item should not generally be disclosed, it does not follow that the item should not be published when a House of Congress considers publication essential for the proper performance of its functions."

FOR OFFICIAL USE ONLY

Approved For Release 2005/02/15 : CIA-RDP85-00759R000100160008-1

It is possible that this provision will be called into play only rarely. Requests for declassification of information by committees have in the past nearly always been worked out to the satisfaction of both parties. Often only a few words need to be deleted or altered to "sanitize" a document. On the other hand, this section could prove a continuing source of discord. Much will depend on whether the new committee is of a disposition to confront or to cooperate with the Executive branch.

E. Section 12 of S. Res. 400 requires all intelligence funds to be authorized in bills or joint resolutions passed by the Senate prior to Senate consideration of appropriation bills for intelligence activities. It is not clear what action the House would take on a Senate authorization of funds which has not been subject to the authorization process in the House. An annual authorization of CIA funds is an entirely new requirement. The CIA Act of 1949 permits funds to be appropriated for CIA without an annual authorization [50 U.S.C. 403(j)]. However, the Act does not preclude an annual authorization, and the Senate has now determined that there should be one.

The chief problem this requirement presents from CIA's point of view is the danger of budget disclosure it entails. The Agency did not object to giving the new Committee a role in the determination of the level of our budget and its program content. We urged, however, that this be done by means which would give a higher degree of assurance that budget secrecy could be maintained than does an annual authorization "by bill or joint resolution."

A floor colloquy between Senators Nunn and Ribicoff established that this new procedure is not automatically to result in budget disclosure (see Appendix B). However, despite a 55-33 June 1974 vote against disclosure of a single intelligence community budget figure, ten of the thirteen members of this Committee who have voted on this issue voted for some form of budget disclosure. Under these circumstances, the Executive branch must continue to develop convincing arguments and education to assure maintaining budget secrecy.

FOR OFFICIAL USE ONLY

## II. POSSIBLE EXECUTIVE BRANCH ACTION

### A. Jurisdiction

1. Section 3(c) of the Resolution provides that other Senate committees can continue to review and study intelligence activities to the extent such activities directly affect a matter within the jurisdiction of the other committee. This is precisely the grounds on which 11 other committees and subcommittees in the past year have asserted their right to access to sensitive CIA matters. It is in CIA's interest that other committees not gain access to information on CIA activities, and the DCI should consider urging the Chairman to attempt to restrain other committees from seeking access to operational information.

2. The jurisdiction of the new Committee encompasses both foreign and domestic intelligence. The Executive branch opposed this, because Justice did not want FBI intelligence activities split from the remainder of the Bureau's operations. Also a factor was the fear that the Committee would attempt to develop identical standards for both domestic and foreign intelligence activities, despite the entirely different constitutional bases, problems, and considerations involved. The concurrent jurisdiction arrangement worked out by Senator Mansfield may have ameliorated Justice's jurisdictional concerns. It may be wise to develop a paper pointing out the inappropriateness of identical standards for the two types of activities in anticipation of the emergence of the second problem.

3. Section 662 of the Foreign Assistance Act requires reports on covert action to be made to "appropriate" congressional committees. The only Senate committee specifically named is the Foreign Relations Committee. However, the Armed Services and Appropriations Committees have been considered "appropriate" committees, and have been receiving section 662 reports. Because covert action is the exclusive province of CIA, there is a reasonable basis for terminating the reports to the Senate Armed Services Committee. This would reduce the number of committees exposed to this information, although it would eliminate a committee which has posed no security problems. The issue of termination of section 662 reports to the Senate Armed Services Committee might best be resolved between Chairman Inouye and Chairman Stennis.

4. CIA attempted in the Government Operations Committee to have section 662 amended to require reports only to the Appropriations and new intelligence committees. However, when the Committee converted the Church Committee's oversight proposal, S. 2893, into a resolution, this became impossible. Subsequently, Senators Percy and Ribicoff announced that they would introduce a bill to amend section 662 in this manner. The Administration should strongly back such a bill and actively push it. However, it might be tactically advantageous to wait until the House of Representatives

FOR OFFICIAL USE ONLY

has considered the oversight issue, as they may do so. At least one House oversight proposal, H. J. Res. 945, introduced recently by Representative Cederberg, would amend these reporting requirements. The House would presumably be reluctant to amend the Act before it has reached its major intelligence oversight decisions.

## B. Staff Clearance

Section 6 of the Resolution provides for staff background investigations, oaths, and written secrecy agreements that the staff member will not disclose Committee information during or after his employment. The Director of Central Intelligence is to consult with the Committee regarding these clearances. The Executive branch should have in mind, before these consultations begin, proposed security agreement language, which agency should conduct the background investigations, and whether or not we should push hard for polygraphs to be administered to the staff.

## C. Disclosure

1. The Executive branch must carefully consider its options in light of the Senate's assertion of its authority to unilaterally declassify Executive branch information. One option, asserting our constitutional objections to this provision, would be to refuse to provide the Committee information unless it agreed in advance not to disclose it. A second option would be to try to win the Committee's agreement to narrow the breadth of this provision. For example, Assistant Attorney General Scalia asserted in his 12 March testimony that in a few situations it would be improper for a House of Congress to authorize any disclosure. The examples he gave were:

(1) When the information has been received under an agreement of non-disclosure.

(2) When the information is protected from disclosure by statutes, e.g., classified communications intelligence. We should seek to have this category include intelligence sources and methods, although the statute is not as helpful as in other cases. Information submitted to the Committee might then be stamped with special designators in addition to the normal Executive branch classification. These designators might include "communications intelligence - protected from disclosure by 18 U.S.C. 793" or "sensitive intelligence sources and methods information - subject to the DCI's statutory responsibility to protect this information from unauthorized disclosure."

(3) When its disclosure has the purpose and effect of negating or frustrating action which both Houses of Congress have authorized the Executive to perform.

A third option would be merely to attempt to build a spirit of cooperation which would enable us to avoid disclosure disputes. As previously pointed out, such disputes have been extremely rare in the past, although a few, such as the four words released by the Pike Committee, have been well publicized.

FOR OFFICIAL USE ONLY

At least  
3  
5  
by

FOR OFFICIAL USE ONLY

Approved For Release 2005/02/15 : CIA-RDP85-00759R000100160008-1

2. Section 8(c)(1) prohibits the disclosure of information in the possession of the Select Committee relating to "lawful" U.S. intelligence activities. Nowhere in the legislative history is there a reference to who should make the decision whether an intelligence activity is lawful. If this decision were left to individual members of the Committee, a member who felt covert action was illegal because it violates international law would be able to unilaterally leak this information. The Executive branch should seek Committee agreement that, at a minimum, this determination would be made by the full Committee in consultation with the Executive branch.

#### D. President's Representative

Section 9 provides that the Select Committee may permit a representative of the President to attend any closed Committee meetings. A decision must be made regarding who should serve in this liaison position.

#### E. Transfer of Church Committee Documents

Section 10 provides that all records, files, documents, and other materials in the possession, custody, or control of the Church Committee should be transferred to the new Committee. Legislative history establishes that the Church Committee is to live up to its agreements with the Executive branch for return of documents. The Executive branch should seek the return of as many of these documents as possible.

#### F. Reporting Responsibilities

1. Section 11 sets forth the Senate's view of agencies' responsibilities to report to the Committee. Specifically, the section states that it is the sense of the Senate that the head of each agency should:

- a. keep the Committee fully and currently informed on intelligence activities;
- b. furnish the Committee any information or document in its possession upon request;
- c. report immediately violations of constitutional rights, law, Executive orders, Presidential directives, or departmental or agency rules or regulations.

The Executive branch should carefully consider the mechanisms and criteria under which it reports to the Committee, and specifically whether existing mechanisms and criteria are satisfactory. The new Committee may well ask for more formalized reporting procedures and may attempt to reach agreement with agencies on reporting responsibilities.

FOR OFFICIAL USE ONLY

Approved For Release 2005/02/15 : CIA-RDP85-00759R000100160008-1

2. Section 11(c) provides that agencies should report immediately activities which amount to violations of the "constitutional rights of any person, violations of law, or violations of Executive orders, Presidential directives, or departmental or agency rules or regulations." A reporting of every violation of minor agency regulations would unacceptably involve the Committee in day-to-day management of the agencies and is probably outside the Committee's interest. The Executive branch should consider uniform reporting standards in this area and should consider seeking Committee acceptance of these standards.

#### G. Annual Authorization

Section 12 requires an annual authorization of all intelligence funds. Intelligence agencies should attempt to reach agreement on how this requirement can best be fulfilled with a minimum of disruption and additional effort, and what procedures would permit intelligence budgets to remain secret. Assuming the Senate continues to support secret budgets, we would then be in a position to recommend a particular course of action to the new Committee.

#### H. Special Study

Section 13 directs the Select Committee to make a study of several matters and to report to the full Senate their recommendations by 1 July 1977. The Select Committee may omit subjects which it determines have been adequately studied by the Church Committee. The Executive branch should determine which of the subjects would benefit from study by the new Committee, either because they may lead to improvements in intelligence activities or congressional procedures, or because there is a reasonable chance that the new Committee would overturn unfavorable findings of the Church Committee. The Executive branch should seek to prove to the Select Committee that the other subjects have been adequately studied.

#### I. Legislation

The Church Committee's final report contained 87 recommendations, over half of which were recommended as new laws. Chairman Inouye has already announced that the new Committee will proceed to consider changes in agencies' charters. The Executive branch should be prepared with its responses to the Church Committee recommendations, as these will no doubt be the starting point for the new Committee's work. There may also be the opportunity to seize the initiative by publicly endorsing certain recommendations.

SIGNED

[Redacted Signature Box]

**STATINT**  
**L**



STATINTL

Approved For Release 2005/02/15 : CIA-RDP85-00759R000100160008-1

Approved For Release 2005/02/15 : CIA-RDP85-00759R000100160008-1

## Essential Features of S. Res. 400

### I. Membership

- A. 15 members (plus the Senate majority and minority leaders who are ex-officio members)
- B. 8 designated seats from the following committees: Appropriations, Armed Services, Foreign Relations, and Judiciary
- C. 7 members appointed at-large
- D. 8 years maximum continuous term

### II. Jurisdiction

- A. "All proposed legislation, messages, petitions, memorials, and other matters" relating to CIA, DCI, intelligence activities of all other departments and agencies of the Government, including but not limited to DOD, State Department, Department of Justice, and Department of the Treasury. "Legislation" includes authorization legislation.
- B. With the exception of legislation concerning CIA and the DCI, any legislation reported by the Select Committee shall be referred for 30 days to a standing committee if the matter relates to the jurisdiction of the standing committee and the Chairman of the standing committee so requests. The Select Committee can get a 30-day referral of legislation reported by standing committees under the same procedures.
- C. Section 3(c) provides "nothing in this resolution shall be construed as ... restricting the authority of any other committee to study and review any intelligence activity to the extent that such activity directly affects a matter otherwise within the jurisdiction of such committee."

### III. Reports

- A. The Select Committee shall make periodic reports to the Senate.
- B. Directors of agencies with intelligence activities shall file annual unclassified reports with the Select Committee on their intelligence activities and the intelligence activities of hostile countries. The unclassified reports may be made publicly available.

### IV. Staff

- A. Staff employees must agree in writing and under oath not to disclose Committee information during or after employment with the Committee.
- B. All staff members must have a security clearance.

### V. Disclosure

- A. Select Committee may disclose publicly any information in its possession under specified procedures requiring notification of the President and a full Senate vote if the President objects.
- B. No classified information relating to lawful intelligence activities which the Select Committee has determined shall not be disclosed shall be made available to any person by a Member, officer, or employee of the Senate, except in closed session.
- C. The Select Committee may under its established regulations make information available to other committees or the members (individual members of the Committee do not have this authority as they did in the Government Operations Committee version).

### VI. Reporting Responsibility

It is the sense of the Senate that the head of each agency should:

- a. keep the Committee fully and currently informed on intelligence activities;
- b. furnish the Committee any information or document in its possession upon request;
- c. report immediately violations of Constitutional rights, law, Executive orders, Presidential directives, or departmental or agency rules. "

## VII. Authorization

The Senate cannot consider appropriations bills including funds for intelligence activities, unless such funds "have been previously authorized by a bill or joint resolution passed by the Senate." All intelligence activities are included in this authorization requirement. Under section 3 of the resolution such bills are the jurisdiction of the Select Committee on Intelligence Activities. A floor colloquy firmly established that this requirement was not to result in budget disclosure, if the Senate continues to believe budget secrecy is required.